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SUPREME COURT OF THE UNITED STATES

October Term, 1957

No. 949

W. H. MORAND, AND WIFE, MARGARET OLIBENE MORAND, *Appellants*

vs.

CITY OF RALEIGH, NORTH CAROLINA, *Appellee*

BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

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On Appeal from the Supreme Court of the State of North Carolina

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BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

Appellants herein file this Brief, opposing Appellee's Motion to Dismiss or Affirm, which has been filed in this cause as a response to said Motion to Dismiss or Affirm Appellants' Appeal and pray the Court to consider this opposing Brief along with their STATEMENT AS TO JURISDICTION which is on file in this cause.

I

THE INSTANT APPEAL PRESENTS A PROPERLY RAISED AND PRESENTED FEDERAL QUESTION WHICH WAS DULY PASSED UPON BY THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

Appellee contends in its Motion to Dismiss or Affirm that (1) the Appellants did not "specify what clause, if any, of the United States Constitution was allegedly violated by the zoning ordinance," (2) the trial Judge of the Superior Court of North Carolina "did not mention the federal constitutional question said to be lurking in this case," and (3) the Supreme Court of North Carolina, "in view of the pleadings herein and the arguments before it, affirmed the trial court without once referring to the Constitution of the United States or to any federal constitutional question hidden in the case," (Appellee's Motion to Dismiss or Affirm, page 3). Nevertheless, the sheer circumstance that the federal question was not specially set up does not lead to the conclusion that Appellants may not appeal to this Court, as a matter of right, where it can be demonstrated, beyond peradventure, that "the Federal question appears in the record and was decided or such decision was necessarily involved in the case, and the case could not have been determined without deciding such question," *Columbia W. Power Co. vs. Columbia Electric Street R. L. & P. Co.*, 172 U. S. 475, 19 S.ct. 247, 43 L. ed. 521; *Kaukauna Water Power Co. vs. Green Bay & M. Canal Co.*, 142 U. S. 254, 12 S. ct. 173, 35 L.ed. 1004.

It is observed that the Appellants specially alleged in their answer before the trial court, that appellee's zoning ordinances were "on face discriminatory and in violation of Article I, Section 7 of the Constitution of the State of North Carolina and in violation of the Constitution of the United States and the same is therefore void." State Record pages 8 and 9. It is further observed that the Appellants also specially alleged, in their answer, which was before the trial court, that Appellee's ordinance "is confiscatory in that it attempts to deprive defendants of their property without due process of law in violation of Article I, Section 17, of the Constitution of the State of North Carolina and in violation of the Constitution of the United States." State Record, pages 8 and 9. The State Supreme Court answered Appellants' contention stating that:

"The contention that the provisions of the zoning ordinance prohibiting the use of the defendants' property, which [illegible] for the residential purposes, for use as

trailer camp, constitute arbitrary, unreasonable, and discriminatory restrictions upon the property of the defendants, is untenable. The ordinance applies alike to all property within the territory affected, *Kinney vs. Sutton*, 230 N. C. 404, 53 S.E. 2d 306; *Wake Forest vs. Medlin*, 199 N. C. 83, 154 S.E. 29. . . .

We hold that the ordinance under consideration, which prohibits the construction and maintenance of a trailer camp within areas zoned for residential purposes within the City of Raleigh and within one mile of its corporate limits, is a valid exercise of the police power and may be enforced by injunctive relief, *City of Raleigh vs. Morand et. al.*, 247 N. C. 363, 100 S.E. 2d 870. See the same opinion which is reproduced in Appellants' STATEMENT AS TO JURISDICTION, page 17.

In ruling upon Appellants' contentions, the Supreme Court of North Carolina particularly cited *Kinney vs. Sutton*, 230 N. C. 404, 53 S.E. 2d 306 and *Wake Forest vs. Medlin*, 199 N. C. 83, 154 S.E. 29, where the Supreme Court of North Carolina had discussed the 14th Amendment to the United States' Constitution in specie, and had cited opinions of this Court in support of the after mentioned opinions. Hence, the fact is inescapable that the Supreme Court of North Carolina considered the Equal Protection and Due Process Clauses of the 14th Amendment to the Constitution of the United States in arriving at its conclusion that "the ordinance under consideration, which prohibits the construction and maintenance of a trailer camp within areas zoned for residential purposes within the City of Raleigh and within one mile of its corporate limits, is a valid exercise of the police power. . . . " See Appellants' STATEMENT AS TO JURISDICTION, page 17. It is apparent that the Supreme Court of North Carolina has considered and determined that Appellants' use of the word "discriminatory" in conjunction with an alleged violation of the Constitution of the United States, is an impleading of the Equal Protection Clause of the 14th Amendment to the Federal Constitution, and that the Appellants' use of the phrase, "confiscatory in that it attempts to deprive defendants of their property without due process of law," in conjunction with an al-

leged violation of the Constitution of the United States, is an impleading of the Due Process Clause of the 14th Amendment to the federal constitution. This conclusion is fortified by the circumstance that the Supreme Court of North Carolina made no reference in specie to Sections 7 and 17 of Article I of the state Constitution, although these two constitutional provisions were specially set up in Appellants' Answer which was before the trial court, (State Record, pages 8 and 9).

Moreover, it is observed that the Supreme Court of North Carolina has consistently maintained that the concept of "law of the land," as used in Section 17 of Article I of the Constitution of North Carolina, is interchangeable with the concept of "due process of law," as found in the federal Constitution, *State vs. Ballance*, 229 N. C. 764, 51 S.E. 2d 731, 7 A.L.R. 2d 407. See also *Eason et al vs. Spence et al.*, 232 N. C. 579, 61 S.E. 2d 217; *Sale vs. State Highway and Publci Works Commission*, 242 N. C. 612, 89 S.E. 2d 290. Thus it necessarily appears that appellants' express use of the phrase "due process of law," in conjunction with an alleged violation of the Constitution of the United States, after having expressly referred to Section 17 of Article I of the state Constitution, was an unequivocal invocation of the Due Process Clause of the 14th Amendment of the federal Constitution. And it is equally as obvious that, because of the interchangeability of the phrases "law of the land" and "due process of law," the 14th Amendment to the federal Constitution was necessarily involved in the conclusion and decision of the state Supreme Court.

Finally, none of the cases cited by Appellee in its Motion to Dismiss or Affirm, (Appellee's Motoion to Dismiss or Affirm, page 4), has any bearing upon the instant inquiry, in as much as all of the cases which are ostensibly in point are cases wherein the state Supreme Courts have *expressly declined to review the federal constitutional question allegedly involved* because of the party's failure to properly present the case to the state tribunal.

Compare *Herndon vs. Georgia, Illinois,* 196 U. S. 78, 25 S. Ct. 176, 49 L. ed. 394; *Bowe vs. Scott,* 233 U. S. 658, S. Ct., 58 L. ed. 1141. However, where the state tribunal has actually passed upon the constitutional question, this Court grants review inspite of the inarticulate manner in which the constitutional question was presented to the state court whose decision is before this Court for review, *Miedreich vs. Lauenstein,* 232 U. S. 236, 34 S. Ct. 309, 58 L. ed. 584.

II

THE INSTANT APPEAL PRESENTS A SUBSTANTIAL FEDERAL QUESTION WHICH SHOULD BE PASSED UPON BY THIS COURT.

Appellants stressfully contend that the questions presented in their STATEMENT AS TO JURISDICTION are substantial and merit the consideration of this Court. The ordinances under protest on this appeal unreasonably subject Appellants' land to a jurisdiction which is entirely foreign to it and unreasonably subject Appellants' land to the whims and caprices of an authority which can not bestow reciprocal benefits upon Appellants, 37 Am. Jur. (Municipal Corp.) Section 284. The ordinances, considering their extra-territorial effect upon Appellants, are necessarily totally oblivious to the ordinary, proper and profitable use to which Appellants' rural property can be put. Compare *Nectow vs. City of Cambride,* 277 U. S. 183, 48 S. Ct. 447, 72 L. ed. 842. It is not enough to assume, as Appellee apparently does, that a zoning jurisdiction invested in the people of the City of Raleigh, to be exercised "for the purpose of promoting the health, safety morals or the general welfare" of the City of Raleigh, (North Carolina General Statute 160-172, can be exercised *against* land outside of the City of Raleigh simply because the extra-territorial exercise of the zoning jurisdiction will benefit the people within the corporate limits. Compare *Myles Salt Company vs. Board of Commissioners of Iberia and St. Mary Draining District,* 239 U. S. 479, 36 S. Ct. 204, 60 L. ed. 392.

CONCLUSION

It is respectfully submitted that the instant appeal presents a properly raised and substantial federal question under 28 U. S. C. 1257(2) and that it was passed upon by the court below.

Respectfully submitted

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